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No. ——

In the Supreme Court of the United States

October Term, 1983

DANNY RAY GRANT et al.
Petitioners

v.

ERIE INSURANCE EXCHANGE et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the Third Circuit Court of Appeals err in affirming the District Court's holding that defendant insurance companies' conspiracy not to compete with respect to providing decedent work loss benefits and/or *agreement to violate* the Pennsylvania No-Fault Motor Vehicle Insurance Act with respect to said benefits was the *"business of insurance"* under the McCarran-Ferguson Act and therefore *exempt* from federal antitrust review?

2. Did the Third Circuit Court of Appeals err in affirming the District Court's holding that defendant insurance companies' *private* agreement *not to compete* with respect to providing or paying *statutorily mandated* and *judicially required* decedent work loss benefits was *not* an agreement in restraint of trade under the antitrust laws?

3. Did the Third Circuit Court of Appeals err in affirming the District Court's holding that defendant insurance companies' *private,* joint and collective refusal to deal with the citizens of Pennsylvania in writing decedents' work loss benefits, and the *private,* joint and collective refusal to deal with decedents' representatives in honoring and settling for decedents' work loss benefits were not acts of "boycott, coercion or intimidation?"

Case Caption

[FULL CAPTION]

Danny Ray Grant, Individually and as Administrator of the Estate of Lynda D. Grant, Deceased; C. William Nye, Jr., Individually and as Administrator of the Estates of Barbara Ann Nye, Deceased, and Karen L. Nye, Deceased; Richard I. Reynolds, Individually and as Administrator of the Estate of Michael L. Reynolds, Deceased; David Paul Yandrich, Individually and as Administrator of the Estates of George N. Yandrich, Deceased, and George Yandrich, Deceased; and all others similarly situated,

Petitioners

vs.

Erie Insurance Exchange; Aetna Casualty and Surety Company; Allstate Insurance Company; American States Insurance Company; CNA Insurance Company; Commercial Union Assurance Company; Donegal Mutual Insurance Company; Employer's Insurance of Wausau; Fireman's Fund Insurance Companies; General Accident Group; Harleysville Insurance Company; Hartford Insurance Group; Home Insurance Company; Insurance Company of North America; Kemper Insurance Company; Keystone Insurance Company; Liberty Mutual Insurance Company; Maryland Casualty Company; Motorists Insurance Companies; Nationwide Mutual Insurance Company; Ohio Casualty Insurance Company; Pennsylvania National Insurance Group; Prudential Property and Casualty Insurance Company; Royal-Globe Insurance Company; Safeco Insurance Company; Shelby Mutual Insurance Company; State Automobile Mutual Insurance Company; Statesman Group; State Farm Mutual Automobile Insurance Company; Travelers Insurance Companies; United States Fidelity and Guaranty Company;

Respondents

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No. ——

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DANNY RAY GRANT, et al.

Petitioners

v.

ERIE INSURANCE EXCHANGE et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners Danny Ray Grant et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 14, 1983.

OPINIONS BELOW

The opinions of the Court of Appeals, and of the District Court, not yet reported, appear in the Appendix hereto.

JURISDICTION

On June 14, 1983, the Third Circuit Court of Appeals entered judgment in favor of the respondents. There have not been any orders with respect to a rehearing of that judgment or extensions of time within which to petition for certiorari. This petition for certiorari was filed within 90 days of the judgment of the Court of Appeals. Your Court's jurisdiction is invoked under 28 U.S. §1254-(1).

STATUTORY PROVISIONS

15 U.S.C. §1012:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulations or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. §1013:

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti Discrimination Act shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

15 U.S.C. §1:

Every contract combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

STATEMENT OF THE CASE

Petitioner, Danny Ray Grant, individually, and as administrator of the Estate of Lynda D. Grant, deceased, and three other estate administrators, on their own behalf and on behalf of others similarly situated, filed their antitrust complaint in the United States District Court for the Middle District of Pennsylvania on November 5, 1980. Thirty-one insurance companies writing *more than 95%* of the no-fault auto insurance business in Pennsylvania were named as defendants below.

The complaint alleged that defendants *conspired not to compete* with one another with respect to providing certain insurance coverage under Pennsylvania's No-Fault Motor Vehicle Insurance Act. Specifically, petitioners alleged that the defendant insurers *privately* agreed to universally define the term "victim" in insurance policies in such a fashion as to exclude 2000 people who die annually on Pennsylvania highways. *As a group* they *privately* persisted *through their federations* to resist post mortem work loss claims *despite the unanimous opinion of the Pennsylvania Supreme Court to the contrary.* Petitioners alleged that the insurers' activities were violative of the antitrust laws, specifically 15 U.S.C. §§1 and 2.

Many, but not all, of the defendants filed answers to the complaint. Thereafter, defendants filed twenty motions to dismiss on behalf of twenty-four defendants; four motions for judgment on the pleadings on behalf of four defendants and a motion for summary judgment on behalf of three defendants. Three of the defendants, through

stipulated facts, admitted to various facts, including specifically the fact that these defendants have continually met with one another through their trade associations and made joint decisions concerning the decedent work loss issue.

Defendants, in their Third Circuit brief, had the temerity to assert McCarran-Ferguson immunity even if they privately agreed to violate state law.

> Defendants' refusal to pay work loss claims on behalf of decedents, whether viewed as an agreement upon a uniform interpretation of the No-Fault Act, *an agreement to violate the No-Fault Act*, or an agreement to establish and enforce uniform policy provisions, satisfied these criteria. (Emphasis added.) (P. 30 of Joint brief.)

On June 8, 1982, the District Court for the Middle District of Pennsylvania filed a memorandum and order ruling on the various motions filed by respondents, defendants below. (A copy of the order is a part of the Appendix hereto.) The court held that the defendant insurance companies had immunity under the McCarran-Ferguson Act and that petitioners' complaint should be dismissed because it failed to allege a violation of the antitrust laws. Accordingly, the court entered judgment in favor of all the defendants, respondents herein. On June 14, 1983, the Third Circuit Court of Appeals, without opinion, affirmed the dismissal of petitioners' claims. The instant petition for certiorari was filed within 90 days of the Court of Appeals judgment.

The basis for federal jurisdiction in the first instance was pursuant to 28 U.S.C. §1331.

REASONS FOR GRANTING THE WRIT

A. An Important Question of Federal Antitrust Law Should Be Settled by This Court

First, the Third Circuit Court of Appeals affirmed the lower court's holding that a conspiracy among insurance companies not to compete with one another with respect to providing certain insurance coverage or even an agreement to *violate* a state insurance law is the *"business of insurance"* and thus *exempt* from antitrust scrutiny. Your Court has explored the fringes of this issue in a series of recent cases. See *Group Life & Health Insurance Company v. Royal Drug Company*, 440 U.S. 205 (1979); *St. Paul Fire & Marine Insurance Company v. Barry*, 438 U.S. 531 (1978); *Union Labor Life Insurance Company v. Pireno*, *U.S.* , 102 S.Ct. 3002, 3009 (1982). The important question of federal antitrust law presented in the instant case has not been presented or decided by your Court. Thousands of decedent families and millions of dollars are involved. The precedential potential is shocking. The Third Circuit judgment, as it now stands, permits insurance companies to privately meet in small groups or through their federations and agree to universally provide or not provide benefits despite the existence of state laws to the contrary. The McCarran-Ferguson Act clearly was never intended to apply so broadly.

Reasons for Granting the Writ

1. *Summary of the Legislative History of the McCarran-Ferguson Act*

The roots of the McCarran-Ferguson Act are traceable to the Supreme Court's opinion in *Paul v. Virginia*, 75 U.S. 168 (1868), which upheld a Virginia statute aimed at the regulation of foreign insurance companies. This Court held that the issuance of an insurance policy was not a transaction of commerce and therefore the state statute did not offend the commerce cause. *Id.* at 183.

Subsequent to this Court's opinion and for the next seventy-four years, this Court consistently held that insurance was not "commerce" and not subject to federal regulation under the commerce clause. *E.g., New York Life Insurance Company v. Deer Lodge County*, 231 U.S. 495 (1913); *Hooper v. California*, 155 U.S. 648 (1895). As a result of such rulings, the insurance industry operated almost exclusively under state regulation between 1869 and 1943. In 1944, however, this Court overturned *Paul v. Virginia* and held that the business of insurance *was* commerce and subject to federal antitrust legislation. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). Subsequent to the Supreme Court's opinion, Congress enacted the McCarran-Ferguson Act in order to restore to the states, except in certain circumstances, primary regulation of the insurance industry which was stripped away in *South-Eastern*.

The passage of the McCarran-Ferguson Act was preceded by the introduction in the Senate Committee of a report and a bill submitted by the National Association of Insurance Commissioners on November 16, 1944. This Court in *Group Life & Health Insurance Company v.*

Royal Drug Company, 440 U.S. 205 (1979) ("Royal Drug"), found the views of the NAIC particularly significant because the McCarran Act was based in large part on the NAIC proposal. *Id.* at 221.

The report emphasized the need for insurance companies to collectively analyze risks so as to insure the continued viability of such companies. Without Congressional approval for such activities, smaller insurance companies would run the risk of miscalculating the statistical likelihood of an event and, accordingly, could face financial disaster. The report specifically stated:

> For these and other reasons this subcommittee believes it would be a mistake to permit or require the unrestricted competition contemplated by the antitrust laws to apply to the insurance business. *To prohibit combined efforts for statistical and rate-making purposes would be a backward step* in the development of a progressive business. We do not regard it as necessary to labor this point any further because *Congress itself recently recognized the necessity for concert of action in the collection of statistical data and rate-making* when it enacted the District of Columbia Fire Insurance Rating Act. (90 Cong. Rec. A 4405 (1944).) (Emphasis added.)

The original bill sponsored by the National Association of Insurance Commissioners enumerated seven specific practices to which the Sherman Act was not to apply. These proposals were rejected by Congress and were replaced with a *narrower* exemption. In fact, *none* of the *original* seven practices envisioned *sanctioning* agreements among insurers *not* to compete with respect to providing insurance benefits.

The House Judiciary Committee Report on H.R. 3270, a forerunner of the McCarran-Ferguson Act, also recognized that insurance is the "distribution of risk according to hazard, experience, and the laws of averages." H.R. Rep. No. 873, 78th Cong., 1st Sess. 8-9 (1943). These factors, the report stated, "are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." *Id.* at 9. These conclusions were echoed in S. Rep. No. 112, 78th Cong., 2d Sess. 6 (1944), which viewed insurance as a personal promise of indemnity, and thus, "something quite different from the ordinary commercial transaction."

Indeed, in signing the legislation which was ultimately adopted by both the House and Senate, President Roosevelt stated that "Congress did not intend to permit *private* rate fixing which *the Antitrust Act forbids*, but was willing to permit actual regulation of rates by affirmative action by the states." (Emphasis added.) *Royal Drug, supra,* at 224, citing S. Rosenman, The Public Papers of Franklin D. Roosevelt 587 (1950).

The legislative history thus confirms what your Court stressed in *Royal Drug*, namely, *"the business of insurance . . . [is] the underwriting and spreading of risk."* 440 U.S. at 220-221. (Emphasis added.)

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2. Risk Reduction Is Not the Business of Insurance

In *Royal Drug* and *Union Labor Life Insurance Company v. Pireno,* U.S. , 102 S.Ct. 3002, 3009 (1982), your Court made clear that the Congressional purpose behind the McCarran-Ferguson Act was to per-

mit insurance companies to collaborate with respect to *statistical and rate-making* matters in order to safely *spread the risk* of insuring against particular risks. The transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time in which the contract is entered. *Union Labor Life Insurance Company v. Pireno, supra;* citing 9 G. Couch, Cyclopedia of Insurance Law §§39:53, 39:63 (2d ed. 1962). Therefore, insurers are permitted to *share information* concerning the frequency and magnitude of various losses in order to develop a reliable *statistical base* for rates. Moreover, the contract with the insured which incorporates that rate is also the business of insurance. By contracting at a given rate the insurance company *spreads,* among all its policyholders, the *risk* against which the policy was issued.

A conspiratorial decision by the insurers not to compete with respect to providing work loss benefits for decedents' estates or a private agreement to violate state law and not pay such proceeds to decedents' estates, however, does not fall within the risk underwriting exemption and is not protected from the antitrust laws. The refusal to pay work loss benefits is merely risk reduction. "[T]here is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk." *Royal Drug* at 214.

Further, a conspiratorial decision not to pay work loss benefits to decedents' estates is not considered the

business of insurance because it occurs *after* the transfer of risk from the insured to insurer has already been made. In *Union Labor Life Insurance Company v. Pireno, supra,* your Court held that a Peer Review Committee utilized by an insurer to aid it in evaluating whether claims for chiropractic treatments were necessary and reasonable was not an exempt activity because it occurred *subsequent* to the evaluation and transfer of risk.

In the instant case, the District Court and the Court of Appeals also misconstrued dictum found in *Securities & Exchange Commission v. National Securities, Inc.,* 393 U.S. 453 (1969), in support of the conclusion that the insurers' activities herein were the business of insurance.[1] The *National Securities* case *simply* held that an Arizona statute which sought to regulate the relationship between a stockholder and the insurance company in which he owned stock was not the business of insurance because such relation did not concern itself with the relationship between the insurer and the insured. A careful reading

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[1] The passage relied upon was as follows:

> Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which Paul v. Virginia held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement —these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. *SEC v. National Securities, Inc.,* 393 U.S. 453 at 460 (1969).

of *National Securities* reveals that your Court did not hold *all* matters concerning contract interpretation were exempt from the antitrust laws. Moreover, your Court did not hold that a conspiracy among insurers was the business of insurance. At most, your Court held that the direct activity between insurers and insureds—*not an insurer conspiracy*—was the business of insurance. 393 U.S. at 459.

B. The Third Circuit's Judgment Order Is in Conflict With the Applicable Decisions of Your Court

Second, your Court should grant the instant petition for certiorari because the Third Circuit judgment affirming the holding that the refusal of the respondent insurance companies to provide certain insurance coverage in order to enforce their conspiracy not to compete is in conflict with the applicable decisions of your Court.

Petitioners' complaint alleged a non-exempt "boycott." In addition to not protecting activities which are not within the "business of insurance," the McCarran-Ferguson Act expressly provides an exception to the general exemption contained in Section 3(b): "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 15 U.S.C. §1013(b) (1976).

The first Supreme Court interpretation of Section 3(b) occurred in *St. Paul Fire & Marine Insurance Company v. Barry*, 438 U.S. 531 (1978). In *Barry*, the plain-

tiffs, who were doctors in Rhode Island and their patients, instituted a class action against the four insurance carriers that had written medical malpractice insurance in the state. In 1975 one of the carriers, St. Paul, announced that it no longer would renew malpractice coverage on an "occurrence" basis (covering any liabilities arising out of acts done during the policy term), and thereafter would write insurance only on a "claims made" basis (covering only claims filed during the term of the policy). According to the plaintiffs' allegations, St. Paul then induced the other malpractice insurers in Rhode Island to refuse to accept applications for malpractice insurance from any of St. Paul's current policyholders. The effect of this alleged scheme would have been to force the plaintiffs to deal only with St. Paul and only on terms dictated by that company. When plaintiffs filed an antitrust claim against the insurance companies, the defendants moved to dismiss on McCarran-Ferguson Act grounds. The district court granted the motion, but a divided First Circuit panel reversed, relying on the Act's "boycott" exception in Section 3(b). Your Court affirmed the judgment of the Court of Appeals.

Before your Court, the defendants argued that the term "boycott" in Section 3(b) should be construed as reaching only those combinations that are intended to coerce competitors (e.g., other insurers), rather than consumers. Your Court rejected the thesis. First, your Court asserted that, "in the absence of indications to the contrary," the statutory language should be construed in accordance with "the customary understanding of 'boycott' at the time of enactment," especially the understanding manifested in Sherman Act case law. So interpreted,

your Court said, the term "boycott" could not be confined to disputes among competitors.

Your Court then proceeded to inquire whether any special factors in the McCarran Act's history or structure dictated a narrower reading of Section 3(b). The legislative history, according to Justice Powell, did not support the defendants' proposed limitation, but rather manifested broad concern about the adverse effects of "regulation by private combinations and groups." Your Court also noted the defendants' argument that a broad construction of Section 3(b) would frustrate the principal objectives of the McCarran-Ferguson Act, since Section 2-(b) generally assigns regulatory control over "the business of insurance" to the states. Justice Powell's response to these points was that the very purpose of Section 3(b) was to limit the effect of Section 2(b).

In defining the scope of the boycott provision, your Court stated:

> This Court also has held unlawful, concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to a desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers. (*Id.* at 543.) (Citations omitted.)

The alleged boycott in *Barry* concerned a refusal by conspirators to provide medical malpractice insurance to appellee so that the appellee was only able to procure such insurance from appellant on an "occurrence" basis rather than on a "claims made" basis; however, your Court plainly did not limit its holding to the particular facts before it. For example, your Court held that "[*t*]*he enlist-*

ment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been viewed as conduct supporting a finding of unlawful boycott." 438 U.S. at 544-545. (Emphasis added.) (Citations omitted.) *In other words, an agreement not to compete with respect to particular insurance coverage also constitutes a boycott under the McCarran-Ferguson Act.* 438 U.S. at 545, n.17. Your Court was of the opinion that the insurers' refusal to provide any medical malpractice insurance was a more severe restraint than refusing to compete with respect to coverage; however, your Court held that a conspiracy of the latter type was nevertheless an illegal restraint of trade:

> St. Paul's policyholders became the captives of their insurer. In a sense the agreement imposed an even greater restraint on competitive forces than a horizontal pact not to compete with respect to price, coverage, claims policy, and service, since the refusal to deal in any fashion reduced the likelihood that a competitor might have broken ranks as to one or more of the fixed terms. The conduct alleged here is certainly not . . . within the category of "agreements which can normally be made in the insurance business." (*Id.* at 553.) (Citation omitted.)

In the instant case, petitioners have alleged that the insurers agreed not to compete with respect to providing or paying work loss benefits to decedents' estates. Obviously, if *any* of the companies offered such coverage or paid such claims, at least some of the other companies would have had to do likewise in order to effectively compete with the more competitive company. *See,* 438 U.S. at 545, n.17. Additionally, the presentation of a universal

front protects the carriers from state insurance department action. Therefore, the District Court's holding, which was affirmed by the Third Circuit, that "an agreement to fix terms of coverage is comparable to an agreement to fix prices", and thus does not constitute a "boycott" was erroneous. Moreover, the conclusion that "individuals in the market for no-fault insurance were not limited with respect to the company from which they could purchase insurance coverage" was also in error. As a result of the alleged conspiracy, purchasers were unable to obtain insurance which included work loss coverage payable to decedents' estates. They were unable to obtain work loss death benefits to which they were entitled. As it now stands, the Third Circuit judgment effectively erodes your Court's opinion in *St. Paul Fire & Marine Insurance Company v. Barry, supra,* 438 U.S. at 542-545.

CONCLUSION

If the present action fails, the "standing" and "statute of limitations" arguments of defendants in state *assumpsit* class actions may well result in many thousands of widows and children being deprived of statutorily-mandated and judicially-required benefits. The insurance industry in Pennsylvania will have accomplished privately by agreement what they could not obtain from the legislature or the Courts. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,

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September 9, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3300

DANNY RAY GRANT, et al.

Appellants

v.

ERIE INSURANCE EXCHANGE, et al.

(Civil No. 80-1281—M.D. Pa.—Scranton)

DISTRICT JUDGE: HONORABLE R. DIXON HERMAN

Argued May 16, 1983

BEFORE: SEITZ, *Chief Judge,* GIBBONS and BECKER, *Circuit Judges.*

JUDGMENT ORDER

After consideration of the contentions raised by appellants and essentially for the reasons expressed by the District Court with regard to the McCarran-Ferguson Act, it is

Judgment Order, U.S. Court of Appeals

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By the Court,
(s) Collins J. Seitz
Chief Judge

ATTEST:
(s) Sally Mrvos
Sally Mrvos, Clerk

Dated: Jun 14 1983

Judgment, U.S. District Court

UNITED STATES DISTRICT COURT
For The
MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action File No. 80-1281

DANNY RAY GRANT, Individually and as Administrator of the Estate of Lynda D. Grant, Deceased; et al.,
Plaintiffs

vs.

ERIE INSURANCE EXCHANGE: et al.,
Defendants

JUDGMENT

This action came before the Court, Honorable R. Dixon Herman, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that judgment be entered in the favor of the Defendants Aetna Casualty & Surety Co., Allstate Insurance Co., CNA Insurance Co., General Accident Group, Hartford Insurance Group, Liberty Mutual Insurance Co., and Ohio Casualty Insurance Co., and against Plaintiffs.

Dated at Harrisburg, PA, this 8th day of June, 1982.

Donald R. Berry, Clerk
(s) Lisa A. Walborn
Deputy Clerk of Court
Lisa A. Walborn

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 80-1281

DANNY RAY GRANT, Individually and as Administrator of the Estate of Lynda D. Grant, Deceased; et al.,
Plaintiffs

vs.

ERIE INSURANCE EXCHANGE; et al.,
Defendants

MEMORANDUM AND ORDER

On November 5, 1980, Plaintiffs[1] commenced this antitrust class action against thirty-one Defendant Insur-

[1] In paragraph 9 of the complaint, Plaintiffs allege:

Representative Plaintiffs are the Administrators of the Estates of deceased victims of motor vehicle accidents killed after the effective date of the Pennsylvania No-Fault Motor Vehicle Insurance Act, to wit, July 19, 1975.

ance Companies[2] pursuant to 15 U.S.C. §§1 through 7, 13 and 15, *as amended*. In the complaint, Plaintiffs allege that Defendants have conspired in restraint of trade to deny work loss benefits to individuals killed in motor vehicle accidents occurring on or after July 19, 1975. This alleged conspiracy consisted of an agreement or agreements among Defendants to refuse to offer insurance coverage with respect to work loss benefits of deceased victims of motor vehicle accidents, not to pay claims for such benefits, to conceal from potential claimants the right to bring such claims, and to provide a joint and uniform defense to claims for work loss benefits. In response, Defendants filed twenty motions to dismiss on behalf of twenty-four Defendants, four motions for judgment on the pleadings on behalf of four Defendants, and a motion for summary judgment on behalf of three Defendants.[3] The parties

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[2] By motion filed on January 19, 1981, Plaintiffs sought to amend the complaint to add three Defendants, namely, Insurance Federation of Pennsylvania, National Association of Independent Insurers, and The American Insurance Association. On the same day, the court ordered Defendants to show cause why Plaintiffs should not be permitted to amend the complaint. Although Defendants, at a conference held on January 28, 1981, indicated that they had no position on Plaintiffs' motion, the court inadvertently failed to grant the motion to amend. We find no reason to correct that oversight because of the decision we reach today.

[3] Upon request by Plaintiffs, the court designated this action as complex litigation and directed that a preliminary pretrial conference be held on January 28, 1981. At that conference, the court ordered a stay of all discovery pending disposition of Defendants' dispositive motions and extended the time within which Plaintiffs could file a motion for class action certification. On March 20, 1981, Plaintiffs filed their motion for class certification and a supporting brief, to which Defendants jointly responded on

have submitted numerous briefs with regard to these motions and oral argument was held on March 13, 1981.[4]

I. Introduction

The controversy in this action surrounds provisions of the Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 P.S. §§1009.101-.701 (Purdon's Supp. 1981), that provide for payment of work loss benefits to persons who suffer injuries arising out of the maintenance or use of motor vehicles. 40 P.S. §§1009.201-.202. The Act establishes minimum insurance coverage for specified victims or survivors of deceased victims. The basic loss benefits include allowable expenses, work loss, replacement services losses and survivors losses. 40 P.S. §1009.-202. As defined by the Act,

> "Work loss" means:
>
> (A) loss of gross income of a victim, as calculated pursuant to the provisions of section 205 of this act [40 P.S. §1009.205]; and
>
> (B) reasonable expenses of a victim for hiring a substitute to perform self-employment services,

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April 2, 1981. Defendants maintained that consideration of the class certification issue should await the court's ruling on dispositive motions. In light of the nature of this action, the court agreed wih Defendants' position. In any event, Plaintiffs' motion for class action certification is rendered moot by this Memorandum and Order.

[4] On March 13, 1981, Plaintiffs filed a petition for a restraining order ancillary to the class action against Defendant State Farm Mutual Automobile Insurance Co. Since Plaintiffs did not submit a brief in support of that motion within ten days of filing the motion as required by Local Rule of Court 401.5, the court has deemed the motion to be withdrawn pursuant to the Local Rule.

thereby mitigating loss of income, or for hiring special help, thereby enabling a victim to work and mitigate loss of income.

40 P.S. §1009.103. Although numerous questions of statutory interpretation arose following passage of the Act, a significant issue involved whether a "deceased victim" could receive work loss benefits. While several lower state courts determined that work loss benefits were only available to victims who survive a motor vehicle accident, *see e.g., Pontius v. United States Fidelity & Guaranty Co.*, 100 Dauphin 133 (Pa. C.P. 1978); *Winegart v. State Farm Mutual Automobile Insurance Co.*, No. 77-5-3437 (York County C.P., filed April 4, 1978); *Anderson v. Nationwide Insurance Co.*, No. 76-19366 (Montgomery Co. C.P., filed February 24, 1978); *Heffner v. Allstate Insurance Co.*, No. 76-3406 (Philadelphia County C.P., filed November 28, 1977); the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania both concluded otherwise. *Heffner v. Allstate Insurance Co.*, 265 Pa. Super. Ct. 181, 401 A.2d 1160 (1979), *aff'd*, 491 Pa. 447, 421 A.2d 629 (1980); *Pontius v. United States Fidelity & Guaranty Co.*, No. 80 March Term, 1978 (Pa. Super. Ct., July 3, 1979), *aff'd*, 491 Pa. 447, 421 A.2d 629 (1980). In the action at bar, Plaintiffs contend that Defendants have refused to provide insurance coverage for work loss benefits of deceased victims and to make payment of such benefits to individuals entitled thereto even though the No-Fault Act mandates such minimum coverage. Specifically, Plaintiffs allege that, in furtherance of a conspiracy to restrain trade, Defendants have taken concerted action to

A. Join in a common plan of refusing or delaying payments of said benefits based on jointly conceived spurious legal grounds;

B. Refuse to compete in providing services such as payment of said benefits to policyholders;

C. Provide for a uniform defensive posture regardless of the differences in the policies of insurance issued by each of the Defendants;

D. Conceal from potential claimants their rights to bring claims for work loss benefits;

E. Restrain competition among themselves by refusing to compete in offering to potential customers and claimants competitive benefits or claims service with regard to decedent's work loss;

F. Conspire to [sic] fix the type and amount of claims services with regard to no-fault work loss benefits for decedents.

Complaint, ¶14.

Although Defendants have sought resolution of this action in three different ways, the grounds upon which they rely are substantially the same. First, they contend that the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, exempts the conduct in question from federal antitrust legislation. Second, they claim that the "state action" doctrine immunizes the alleged activity from antitrust scrutiny. In addition, Defendants assert that their activities constitute an exercise of their First Amendment rights which is outside the scope of the antitrust laws in accordance with the *Noerr-Pennington* doctrine. Finally, Defendants claim that Plaintiffs have failed to allege a restraint of trade or any other antitrust violations.

II. Plaintiffs' Claims Pursuant to 15 U.S.C. §§2, 3, 6 and 13

In the complaint, Plaintiffs allege that this action is brought pursuant to 15 U.S.C. §§1 through 7, 13 and 15, *as amended*. Even if the court found that the complaint should not be otherwise dismissed, Plaintiffs have clearly failed to state a claim upon which relief can be granted based upon 15 U.S.C. §§2, 3, 6 and 13. 15 U.S.C. §2 prohibits monopolies or attempts to monopolize. 15 U.S.C. §3 affects only antitrust activities that involve a United States territory or the District of Columbia. 15 U.S.C. §6 relates only to forfeiture of property in transit to the United States. Finally, 15 U.S.C. §13 makes it unlawful to discriminate between different purchasers of commodities in prices, services or facilities. The court has reviewed the complaint and discovered no allegations that even vaguely hint at violations of those provisions. Moreover, Plaintiff has completely failed to respond to the arguments in favor of dismissal based on these contentions. Therefore, the complaint will be dimissed to the extent it raises antitrust claims pursuant to these provisions.[5]

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[5] Accordingly, Plaintiffs' antitrust claim is limited to 15 U.S.C. §1, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." The remaining provisions merely relate to civil actions by private persons, 15 U.S.C. §15; jurisdiction, 15 U.S.C. §4; bringing in additional parties, 15 U.S.C. §5; and definitions, 15 U.S.C. §7.

Memorandum

III. The McCarran-Ferguson Act

The McCarran-Ferguson Act provides in relevant part:

> Sec. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> Sec. 3.
>
> . . .
>
> (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

15 U.S.C. §§1012-1013. To come within the scope of this exemption, Defendants must show that the challenged activity is (1) part of the business of insurance, (2) regulated by state law and (3) not an agreement or act to

boycott, coerce or intimidate. We address these requirements seriatim.

A. Business of Insurance

As the Court of Appeals for the Third Circuit recently observed:

> The McCarran-Ferguson Act contains no definition of the "business of insurance." The term appears in a statute creating a limited exemption to the antitrust laws, however, and thus falls within the compass of the general rule that even express exemptions from antitrust laws are narrowly construed. Thus the Court has held that the exemption is not applicable to all activities of insurance companies, but only to those activities falling within the "ordinary understanding" of the statutory phrase. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979); *SEC v. National Securities, Inc.*, 393 U.S. 453, 459-60 (1969).

Owens v. Aetna Life & Casualty Co., 654 F.2d 218, 224 (3d Cir.), *cert. denied*, U.S. (1981) (footnote omitted). Commonly understood aspects of the business of insurance are spreading and underwriting of a policyholder's risk and the relationship between the insurer and insured. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. at 211-17. As explained in *SEC v. National Securities, Inc.*,

> *The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance."* Undoubtedly, other

> activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.

393 U.S. at 460. Clearly, the acts alleged in the complaint fall within this group of activities.

Cooperative efforts by Defendants with respect to collection of statistical data and ratemaking are unquestionably part of the business of insurance. The Third Circuit Court of Appeals has also recognized that the authorization of agents to solicit individual or group policies and the acceptance or rejection of coverages tendered by brokers is covered within the ambit of business of insurance. *Owens v. Aetna Life & Casualty Co.*, 654 F. 2d at 226. We perceive no distinction between such conduct and joint undertakings concerning the interpretation and extent of coverage of the Pennsylvania No-Fault Motor Vehicle Insurance Act. In *McIlhenny v. American Title Insurance Co.*, 418 F. Supp. 364 (E.D. Pa. 1976), the court granted a motion to dismiss when the complaint alleged that the defendant title insurance companies agreed among themselves to require purchasers of newly constructed homes to buy mechanic's lien insurance as part of their coverage. In so ruling, the court concluded that "[m]atters of rate, extent of coverage, and policy provisions go to the very heart of the relationship between the insurance company and the policyholder and therefore clearly fall within the *National Securities* definition of the business of insurance." *Id.* at 369. *See also Anglin v. Blue Shield of Virginia*, 510 F. Supp. 75, 78-79 (W.D.

Va. 1981) (extent of insurance coverage constitutes business of insurance). Although *McIlhenny* was decided prior to the *Royal Drug* case, we have not discerned any analysis in *Royal Drug* that would mandate a contrary result in *McIlhenny*.

The cases cited by Plaintiffs to support their position, however, concern agreements between insurance companies and noninsurers. *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) (agreement between insurer and retail pharmacists); *Pireno v. New York State Chiropractic Assoc.*, 650 F.2d 387 (2d Cir. 1981) (agreement between insurer and peer review committee);[6] *St. Bernard Hospital v. Hospital Service Association of New Orleans, Inc.*, 618 F.2d 1140 (5th Cir. 1980) (contract between insurer and hospital); *Liberty Glass Co. v. Allstate Insurance Co.*, 607 F.2d 135 (5th Cir. 1979) (agreement to fix prices between insurers and glass installers). As such, those agreements undoubtedly went beyond the business of insurance. We find no similarity between the concerted conduct alleged in the complaint and the agreements in those cases.

Even if the alleged agreement to fix the extent of coverage regarding work loss benefits to victims of motor vehicle accidents is the business of insurance, Plaintiffs also attack the joint meetings to discuss common litigation

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[6] In *Pireno*, the Second Circuit noted that "the specification of the terms of the contract between insurer and insured seems far more closely associated with the business of insurance than does the use of consultants in interpreting the policy limits." 650 F.2d at 394, n. 11. Such language certainly detracts from the persuasive force of the *Pireno* decision as applied to the issues in this case.

strategy, coordinating defenses to prevent claimants from recovering work loss benefits and other combined efforts to avoid payment of work loss benefits to deceased victims. The court believes that such conduct is part of the business of insurance in that it relates to the interpretation and enforcement of the relationship between insurer and insured. *See SEC v. National Securities, Inc.*, 393 U.S. at 460. Since these activities are necessary to carry out any agreement concerning the extent of insurance coverage and type of policy, they fall within the language of the statute. To rule otherwise would vitiate the effect of the agreement. In any event, as we explain in a subsequent portion of this memorandum, such conduct resulted from a dispute over state law. It does not constitute a restraint of trade or any other antitrust violation.[7]

B. Regulated by State Law

The court has no difficulty in concluding that the alleged activity is regulated by Pennsylvania insurance law. Under the provisions of the No-Fault Act,

> Approval of terms and forms. —Terms and conditions (including forms used by insurers) of any contract, certificate, or other evidence of insurance sold or issued pursuant to this State's no-fault plan for motor vehicle insurance in accordance with this act and providing no-fault benefits or any required tort liability are subject to approval and regulation by the commissioner. The commissioner shall approve only terms and conditions which are consistent with the purposes of this act and fair and equitable

[7] *See* pp. 21a-23a *infra*.

> to all persons whose interests may be affected. The commissioner may reasonably limit by rule the variety of coverage available in order to give purchasers of insurance a reasonable opportunity to compare the cost of insuring with various insurers.

40 P.S. §1009.209 (b). The No-Fault Act further requires that insurers who desire to write insurance applicable to motor vehicle accidents "shall, as a condition of qualifications, prepare and file policy forms and insurance rates, for coverages effected by this act." 40 P.S. §1009.504-(a). Moreover, the Unfair Insurance Practices Act, 40 P.S. §§1171.1-.15 (Purdon's Supp. 1981), also regulates the alleged activities of the Defendants. This law prohibits unfair methods of competition and unfair or deceptive practices in the business of insurance, which include, in part:

> (4) *Entering into any agreement to commit, or by any concerted action committing, any act or boycott, coercion or intimidation* resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.
>
> . . .
>
> (10) Any of the following acts if committed or performed with such frequency as to indicate a business practice shall constitute unfair claim settlement or compromise practices:
>
> (i) Misrepresenting pertinent facts or policy or contract provisions relating to coverages at issue.
>
> . . .
>
> (vi) *Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in*

which the company's liability under the policy has become reasonably clear.

(vii) Compelling persons to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts due and ultimately recovered in actions brought by such persons.

40 P.S. §1171.5 (emphasis added). *See Steinberg v. Guardian Life Insurance Co. of America*, 486 F. Supp. 122, 124 (E.D. Pa. 1980); *Black v. Nationwide Mutual Insurance Co.*, 429 F. Supp. 458 (W.D. Pa. 1977), *aff'd*, 571 F.2d 571 (3d Cir. 1978). *See also* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, §47.02[2].

C. Agreement or Act to Boycott, Coerce or Intimidate

The final prerequisite to qualify for McCarran-Ferguson Act immunity is that the challenged activity is not an agreement or act to boycott, coerce or intimidate. 15 U.S.C. §1013(b). "A boycott cognizable under the antitrust laws is a concerted refusal to deal." *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195, 1206 (7th Cir. 1981), *appeal pending*. The standard by which we determine whether a boycott is alleged in the complaint is set forth in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978). In that case, the Court based its decision on the following factual allegations:

During the period in question, petitioners St. Paul Fire & Marine Insurance Co. (St. Paul), Aetna Casualty & Surety Co., Travelers Indemnity of Rhode Island (and two affiliated companies), and Hartford Casualty Co. (and an affiliated company) were the

> only sellers of medical malpractice insurance in Rhode Island. In April 1975, St. Paul, the largest of the insurers, announced that it would not renew medical malpractice coverage on an "occurrence" basis, but would write insurance only on a "claims made" basis. Following St. Paul's announcement, and in furtherance of the alleged conspiracy, the other petitioners refused to accept applications for any type of insurance from physicians, hospitals, or other medical personnel whom St. Paul then insured. The object of the conspiracy was to restrict St. Paul's policyholders to "claims made" coverage by compelling them to "purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that [such] purchase must be made on terms dictated by the defendant, St. Paul." It is alleged that this scheme was effectuated by a collective refusal to deal, by unfair rate discrimination, by agreements not to compete, and by horizontal price fixing, and that petitioners engaged in "a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island."

Id. at 534-35 (footnotes and citations omitted). The Court reviewed the legislative history of the McCarran-Ferguson Act and concluded that the term "boycott" should be construed in a "broad and unqualified" manner. *Id.* at 550. Accordingly, the Court determined that

> The conduct in question accords with the common understanding of a boycott. The four insurance companies that control the market in medical mal-

practice insurance are alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance to its policyholders. "A valuable service germane to [respondents'] business and important to their effective competition with others was withheld from them by collective action." *Silver v. New York Stock Exchange*, 373 U.S. 341, 348-349, n. 5 (1963).

The agreement binding petitioners erected a barrier between St. Paul's customers and any alternative source of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. This concerted refusal to deal went well beyond a private agreement to fix rates and terms of coverage, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service. Cf. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977). St. Paul's policyholders became the captives of their insurer. In a sense the agreement imposed an even greater restraint on competitive forces than a horizontal pact not to compete with respect to price, coverage, claims policy, and service, since the refusal to deal in any fashion reduced the likelihood that a competitor might have broken ranks as to one or more of the fixed terms. The conduct alleged here is certainly not, in Senator O'Mahoney's terms, within the category of "agreements which can normally be made

> in the insurance business," 91 Cong. Rec. 1444 (1945) or "agreements and combinations in the public interests [sic] which can safely be permitted," *id.*, at 1486.

Id. at 552-53 (footnote omitted) (emphasis added). A proper reading of the *St. Paul Fire* case indicates that an agreement to fix terms of coverage is comparable to an agreement to fix prices, and thus, does not constitute a boycott. If an agreement to fix rates is exempt under the McCarran-Ferguson Act, as Plaintiff acknowledges, Plaintiffs' Brief Contra Defendants' Motion to Dismiss, pp. 22-23, then this court perceives no basis for reaching a contrary result with respect to an agreement to interpret the No-Fault Act provisions regarding work loss benefits in the same way.

Unlike the agreement in *St. Paul Fire,* the agreement alleged in the complaint does not constitute a refusal to deal with consumers.[8] Individuals in the market for no-

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[8] Plaintiffs' counsel has submitted three affidavits that he urges the court to consider in ruling upon the motions filed on behalf of Defendants. These affidavits are based upon "personal experience, hearsay comments from other plaintiff and defense counsel and insurance people, and from implication or inference after digesting numerous letters of rejection, preliminary objections and briefs filed by defense counsel and their insurance companies. . . ." Plaintiffs' Counsel's Affidavit, doc. no. 117, pp. 1-2. Defendants filed a motion to strike these affidavits for the reasons that such affidavits should not be considered in disposing of a motion to dismiss filed without supporting affidavits, the affidavits are speculative and not based upon personal knowledge, Plaintiffs' counsel would not be competent to testify about such facts in any hearing or trial and the filing of the affidavits by Plaintiffs' counsel constitutes a violation of the Code of Profes-

fault insurance were not limited with respect to the company from which they could purchase insurance coverage. Indeed, pursuant to the No-Fault Motor Vehicle Insurance Act, insurance companies had to provide coverage for work loss benefits. The alleged agreement or concerted action in this action only involved the interpretation of statutory language concerning the scope and extent of work loss benefits and attempts to obtain legislative and judicial approval of Defendants' interpretation. This wholly intra-industry agreement is akin to ratemaking. Such allegations do not constitute a concerted refusal to deal. Similarly, in *Quality Auto Body, Inc. v. Allstate Insurance Co.*, the court detected no boycott when "[t]he gravamen of Quality's complaint [did] not appear to be defendants' refusal to deal but rather defendants' refusal to pay more than the prevailing competitive price for labor and new parts." 660 F.2d at 1206. Moreover, policyholders continue to have "the benefits of competition in vital matters such as claims policy and quality of service." *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. at 553.

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sional Responsibility. The parties submitted briefs with respect to the motion to strike. Although we agree with Defendants that affidavits submitted in connection with a motion must be based on personal knowledge and not information, belief or hearsay, *Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980); *Orlik Ltd. v. Helme Products Inc.*, 427 F. Supp. 771, 778 (S.D. N.Y. 1977), we will nevertheless deny the motion to strike at this time because we find nothing in the affidavits that alters the court's decision regarding the issue of whether Defendants' conduct constitutes a boycott. If anything, the affidavits support the view that the alleged agreement only concerned the interpretation of a provision in the No-Fault Act and was not a refusal to deal.

Plaintiffs must also allege an injury of the type the antitrust laws were intended to prevent and that flows from Defendants' conduct to state a cause of action under the antitrust laws. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). They cannot transform what is basically a claim for violations of the No-Fault Motor Vehicle Insurance Act into an antitrust action merely by alleging a conspiracy between Defendants. *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969); *Huron Valley Hospital, Inc. v. City of Pontiac*, 466 F. Supp. 1301, 1315-16 (E.D. Mich. 1979), *vacated on other grounds*, 666 F.2d 1029 (6th Cir. 1981). In *Anglin v. Blue Shield of Virginia*, 510 F. Supp. 75 (W.D. Va. 1981), the court concluded:

> While the Plans have unquestionably not offered to the plaintiff the coverage he seeks, that coverage is not offered to anyone by the Plans, because it is not a coverage written by the Plans. While comparison is odious in general, and dangerous in particular in an opinion, at least an analogy can be drawn between the situation at bar, and a suit against General Motors and Ford Motor Co. because neither will now sell a 1981 convertible automobile to the plaintiff customer. The fact that neither motor company now offers a convertible model in the marketplace is at least analogous to the fact that the Plans do not offer in the marketplace the coverage desired by the plaintiff here.

Id. at 80-81. In the case before this court, Defendants did not offer the coverage sought by Plaintiffs because their interpretation of the No-Fault Act did not require

such coverage. At least four lower state courts agreed with this position. While the state appellate courts held otherwise, they recognized the difficulty of divining the intent of the No-Fault Act and stated:

> At the outset we caution anyone who embarks on the high seas of Pennsylvania's No-Fault Motor Vehicle Insurance Act not to do so without a good compass, a knowledge of reefs and storms and plenty of food and water. Any attempt to choose an alternate route by land in an effort to unlock the secrets of the Act will encounter mazes of paths, pitfalls, underbrush and dead ends. In attempting to explain what should be the rudimentary "work loss" compensatory scheme, no less an experienced guide than the Pennsylvania Bar Institute was forced to conclude that the Act is impenetrable. In its book, Pennsylvania No-Fault Motor Vehicle Insurance Act—Practice Under the Act (Pub. No. 61, 1975), PBI unequivocally asserts:
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> "It is not possible to determine with any degree of certainty the amount of work loss benefits required to be paid under the act. . . . The act is essentially incapable of execution since there are at least four possible interpretations of how 'basic loss benefits' for 'work loss' are calculated. None of the interpretations properly use all of the act and the provisions are apparently totally irreconcilable." *Id.* at 22.

Heffner v. Allstate Insurance Co., 265 Pa. Super. Ct. 181, 184, 401 A.3d 1160, 1161 (1979). Under such circumstances, this court discerns no antitrust violation. Indeed, Plaintiff Nye has initiated a class-action suit in assumpsit

against these Defendants in the Dauphin County Court of Common Pleas based upon the No-Fault Act and thus has recognized the actual nature of the claim. *Nye v. Erie Insurance Exchange*, No. 5349-S-79 (Dauphin Co. C.P.). Accordingly, the motions to dismiss will be granted.

Since the court has determined that it should grant the motions to dismiss, it is also convinced that the motions for judgment on the pleadings and summary judgment are meritorious.

> In considering a motion for judgment on the pleadings, this court is required to view the facts presented in the pleadings and the inference to be drawn therefrom in the light most favorable to the non-moving party. The motion will be granted only if the movant establishes that no material issue of fact awaits resolution and that he is entitled to judgment as a matter of law.

Alken v. Lerner, 485 F. Supp. 871, 873 (D. N.J. 1980) (citations omitted). Similarly, in considering the motion for summary judgment, this court must consider the pleadings, affidavits and other documents to determine whether they show that no genuine issue as to any material fact exists and that Defendants are entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56. We have applied these legal principles to the motions before the court and have viewed the facts in a light most favorable to Plaintiffs. In addition, we have examined the stipulation of facts (doc. no. 121) agreed upon by Plaintiffs and the three Defendants who filed the summary judgment motion and which are deemed undisputed for purposes of that motion. Moreover, we considered the state-

ments in the affidavits of Plaintiffs' counsel. After such deliberation, the court has found no material issue of fact and concluded that on the basis of the McCarran-Ferguson Act, as previously explained, the motions for judgment on the pleadings and summary judgment should be granted.[9]

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[9] Although several Defendants have also raised the "state action" doctrine as a basis for dismissal of this action, we would deny such motions on that ground.

> *The threshold inquiry* in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe *is whether the activity is required by the State acting as sovereign.* Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent.
>
> . . .
>
> It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, *anticompetitive activities must be compelled by direction of the State acting as a sovereign.*

Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91 (1975) (emphasis added). This court cannot determine from the face of the complaint that the alleged activities are *required* by the State acting as sovereign.

Similarly, several Defendants rely upon the *Noerr-Pennington* doctrine to establish immunity from the alleged antitrust violations. This doctrine based upon decisions of the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Fright, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), sets forth "the general rule that lobbying and other similar concentrated efforts by businessmen to obtain legislative or executive action do not violate the antiturst laws, even though intended to eliminate competition or otherwise restrain trade." 7 Von Kalinowski, Antitrust Laws and Trade

IV. Conclusion

On the basis of the foregoing, the court concludes that the motion for summary judgment filed by Defendants Aetna Casualty & Surety Co., General Accident Group, and Hartford Insurance Group, the motions for judgment on the pleadings submitted by Defendants Allstate Insurance Co., CNA Insurance Co., Liberty Mutual Insurance Co., and Ohio Casualty Insurance Co., and the motions to dismiss filed by the remaining Defendants should be granted.

An appropriate order will be entered.

(s) R. DIXON HERMAN
R. DIXON HERMAN
United States District Judge

Dated: June 8th, 1982

Regulation, §46.04, pp. 46-35. Attempts to utilize administrative and judicial processes are also exempted under this doctrine. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). Of course, resort to such activities as a mere sham to cover anticompetitive conduct is not exempt. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. at 511-15; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. at 144. Nevertheless, having determined that the McCarran-Ferguson Act applies to the conduct alleged in the complaint, we decline to the rule upon Defendants' claims of *Noerr-Pennington* immunity, particularly since some of the conduct alleged in the complaint falls outside the scope of the doctrine and because Plaintiffs alleged that Defendants agreed upon "jointly conceived *spurious* legal grounds." (Emphasis added).

Memorandum
Order

ORDER

AND NOW, this 8th day of June, 1982, in accordance with the accompanying memorandum, IT IS HEREBY ORDERED, as follows:

1. Defendants' motion to strike the affidavits of Plaintiffs' counsel be, and the same is, denied;

2. Plaintiffs' motion to amend the complaint to add defendants be and is denied as moot;

3. Plaintiffs' motion for class action certification be and is denied as moot;

4. Plaintiffs' petition for a restraining order ancillary to class action be and is deemed withdrawn;

5. The motions for judgment on the pleadings filed by Defendants Allstate Insurance Co., CNA Insurance Co., Liberty Mutual Insurance Co., and Ohio Casualty Insurance Co. be, and the same are, granted;

6. The motion for summary judgment submitted by Defendants Aetna Casualty & Surety Co., General Accident Group, and Hartford Insurance Group be and is granted;

7. The motions to dismiss filed on behalf of the remaining Defendants be and are granted; and

8. The Clerk of Court is directed to enter judgment in favor of Defendants Aetna Casualty & Surety Co., Allstate Insurance Co., CNA Insurance Co., General Acci-

dent Group, Hartford Insurance Group, Liberty Mutual Insurance Co., and Ohio Casualty Insurance Co. and against Plaintiffs.

(s) R. DIXON HERMAN
R. DIXON HERMAN
United States District Judge